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No. 95-1595

In the Supreme Court of the United States

OCTOBER TERM, 1995

BRUCE BABBITT, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

MARVIN K. YOUPEE, SR., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

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1. Respondents argue that the Ninth Circuit correctly held that the escheat of *de minimis* fractional interests in allotted Indian land under Section 207 of the amended Indian Land Consolidation Act (ILCA), 25 U.S.C. 2206, violates the Just Compensation Clause of the Fifth Amendment. For the reasons stated in the petition (at 11-15), we disagree.

Respondents suggest (Br. in Opp. 5-6) that their decedent had an absolute right to devise the fractional interests by virtue of Section 5 of the General Allotment Act, 25 U.S.C. 348 (which provides that an allotment shall be held in trust for the benefit of the original allottee "or, in case of his decease, of his heirs according to the laws of the State or Territory

where such land is located"), and 25 U.S.C. 373 (which provides that the owner of an interest in a trust allotment "shall have the right * * * to dispose of such property by will"). Those statutory provisions, however, merely set forth the law of testate and intestate succession that are applicable unless and until they are raised or superseded by other Acts of Congress, such as the ILCA. They create no special vested rights in particular rules of devise or intestate succession that are beyond the power of Congress to alter. See, *e.g.*, *Jefferson* v. *Fink*, 247 U.S. 288, 293-294 (1918); *Hodel* v. *Irving*, 481 U.S. 704, 712, 717 (1987).

Respondents also advance the argument, not relied upon by the court of appeals, that, because the ILCA prohibits intestate descent of fractional interests in allotted lands, "an entire class of Indian decedents who are under twenty-one [and therefore precluded from making wills] are foreclosed from devising their 2% interests or allowing them to descend." Br. in Opp. 7-8; see Pet. App. 22a (referring to argument).[1] Respondents, however, have no standing to assert the rights of Indian decedents who are minors, or their heirs. Respondents' decedent was 76 years old when he died, see Pet. App. 27a-28a, and he had ample opportunity to and did execute a valid will. If there are doubts about the constitutionality of the ILCA as applied to decedents who were minors when they died, that claim should be made by the heirs or devisees of such decedents, not by respondents. Even if the ILCA were unconstitutional as applied to such individuals,

[1] Under 25 U.S.C. 373, the age at which a person who has any interest in a trust allotment may dispose of such property by will is 18, not 21, as respondents assert. See Pet. App. 22a.

that would provide no basis for refusing to apply it in this case.

2. Respondents also argue (Br. in Opp. 8-10) that this case is procedurally flawed, because the certiorari petition fails to list two of the respondents as parties to the proceeding in the court of appeals. See Sup. Ct. R. 14.1(b). In respondents' view, "because Darlan D. Youpee and Williamette [Y. Bussard] are not named as respondents, this Court is not vested with jurisdiction over them," and they "are vested with a final judgment from the Ninth Circuit that is not reviewable." Br. in Opp. 9.

We acknowledge that the petition is incorrect in this regard, and that the two individuals—Darlan D. Youpee and Williamette Y. Bussard—were plaintiffs in the district court proceeding and appellees in the court of appeals. We regret the error.[2] Nonetheless, that error has no effect on the jurisdiction of this

[2] At Pet. 7 n.2, we described the allotment interests of the four named respondents that escheated. In addition, all of the four allotment interests bequeathed to Williamette Y. Bussard escheated and 20 of the allotment interests bequeathed to Darlan D. Youpee (the residual beneficiary, see Pet. App. 33a), escheated. E.R. 30, 40-44. In addition, at Pet. 16, we discussed the nature and value of the parcels that would have escheated. When the parcels bequeathed to Williamette Y. Bussard and Darlan D. Youpee are considered in the calculation, the figures change slightly. Thus, the interests that would have passed to all respondents but that instead escheated under the ILCA range from .05% to 1.67% of the parcel involved, see E.R. 40, 19; their average annual income for the preceding five years ranged from zero to $12.55, see E.R. 18, 42; and the estimated value of the escheated interests that have a defined cash value ranged from $2.69 to $333.33, see E.R. 42. See also E.R. 41, 42, 43, 44 (listing parcels whose value is listed only as "nominal").

Court, on the identities of the parties before the Court, or on the questions presented in this case.[3]

Under Rule 12.6 of the Rules of this Court, "[a]ll parties to the proceeding in the court whose judgment is sought to be reviewed are deemed parties entitled to file documents in this Court," and "[a]ll parties other than the petitioner are considered respondents." See, *e.g.*, *O'Bannon* v. *Town Court Nursing Center*, 447 U.S. 773, 783-784 n.14 (1980). Accordingly, regardless of whether they were named in the petition, Darlan D. Youpee and Williamette Y. Bussard are parties respondent to this proceeding, see Robert L. Stern et al., *Supreme Court Practice* 323-325 (7th ed. 1993), and are not "vested with a final judgment from the Ninth Circuit that is not reviewable." Br. in Opp. 9. The cases on which respondents rely (*id.* at 9-10) in arguing that the petition must be dismissed concerned the omission of a necessary party from a notice of appeal filed in district court, see *Torres* v. *Oakland Scavenger Co.*, 487 U.S. 312 (1988), and the failure of a party aggrieved below to file an appeal in this Court, see *Hartford Accident & Indem. Co.* v. *Bunn*, 285 U.S. 169 (1932). Those cases have nothing to do with the jurisdiction of this Court over a timely filed petition for a writ of certiorari, and they do not suggest that a party not named as a respondent in a certiorari petition thereby loses that party's status as respondent in this Court.

[3] Because they were represented below by the same counsel as the four respondents who were listed in the petition, they were properly served with the petition and have had the same opportunity to respond to the petition as have the other four respondents.

In any event, even if the two respondents whose names were omitted were not parties to the proceedings in this Court, it would not affect the Court's jurisdiction over the case or the legal issues it presents. Interests in land that William Youpee attempted to devise to each of the four respondents who were named in the petition escheated under the ILCA. See Pet. 7 n.2. The district court and court of appeals held that those escheats were unconstitutional. Thus, the question of the constitutionality of the ILCA would be squarely before this Court, even if the two additional respondents were not parties.

As we explain in the certiorari petition (at 14-17), that question warrants review by this Court. The court of appeals has held an Act of Congress unconstitutional. That ruling calls into question the settlements of thousands of estates involving escheatable interests in the Ninth Circuit alone, disrupts the ongoing implementation of this important remedial statute, and thereby frustrates Congress's efforts to address the pressing problem of fractionated ownership of Indian lands.

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For the foregoing reasons and those stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

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